November 8, 2002

VIA FAX AND E-MAIL

Lawrence Norton, Esquire
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Advisory Opinion Request 2002-13

Dear Mr. Norton:

FEC Watch and the Center for Responsive Politics submit these comments on Advisory Opinion Request (AOR) 2002-13. FEC Watch is a project of the Center For Responsive Politics (CRP), a non-partisan, non-profit research group based in Washington, D.C. that tracks money in politics and its effect on elections and public policy. FEC Watch's objective is to increase enforcement of the nation's campaign finance, lobbying, and ethics laws. FEC Watch monitors the enforcement activities of the Federal Election Commission and other government entities, including the Department of Justice and congressional ethics committees, and encourages these entities to aggressively enforce the law.

Procedural issues

Before responding to AOR 2002-13, the Commission should resolve several procedural issues raised by the request. The request was submitted by four national party committees. However, several of the questions presented in the request relate to activities that would be conducted by unnamed state and local party committees, and to entities established by those committees. Other questions relate to activities to be conducted by unnamed federal candidates, and to entities established by those candidates.

Section 112.1(b) of the Commission's regulations states that an advisory opinion request

> shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests.

11 CFR 112.1(b). Under this rule, the national party committees lack standing to seek Commission approval of activities that would be conducted by state and local party committees and their derivative entities. The national party committees also lack standing to seek approval of activities that would be conducted by federal candidates and entities established by those candidates.

The Commission's request for additional information asked the parties to provide the names of state and local party committees and federal candidates that will raise and spend recount funds. The party committees indicated that are unable to provide this information because they are not certain which elections will involve recount proceedings. The requesters should not be able to assert that they have standing to make a request on behalf of third parties, and then refuse to identify those third parties to the Commission. In accordance with the language of the regulations and longstanding agency practice, the Commission should decline to address those portions of the request that relate to activities to be conducted by any entity other than the requesters.

In the event that the Commission decides to respond to the questions presented in the request, we offer the following comments on the substantive issues presented.

Status of recount funds

The central issue in AOR 2002-13 is the status of recount funds under the FECA and BCRA. Prior to the enactment of BCRA, the Commission's regulations exempted amounts received or spent "with respect to a recount of the results of a Federal election" from the definitions of "contribution" and "expenditure." 11 CFR 100.91 and 100.151. According to the Explanation and Justification for these provisions, recount receipts and disbursements are excluded from the definitions of contribution and expenditure because recounts and election contests, "though they are related to elections, are not Federal elections as defined by the Act." *Federal Election Regulations*, House Document 95-44 at 40 (1977) (*FEC E & J Compilation* at 38, 42).

However, this exemption is not absolute. Although recount funds are not contributions or expenditures, "the prohibitions of 11 CFR 110.4(a) and part 114 apply." 11 CFR 100.91 and 110.151. Thus, recount funds are covered by section 441b, which prohibits corporations and labor organizations from making contributions and expenditures "in connection with any election" to Federal office. 2 U.S.C. § 441b. They are also covered by section 441e, which prohibits contributions

and expenditures by foreign nationals "in connection with an election to any political office." 2 U.S.C. § 441e.

AOR 2002-13 rests almost entirely upon the assertion that recounts are not federal elections. The request is technically correct that recounts are not specifically listed in the definition of "election" in 2 U.S.C. § 431(1). However, this is not because a recounts have no connection to elections, but because an election recount is so closely connected to the underlying election that it cannot be separated from that election and treated as some sort of stand-alone proceeding.

Amounts spent on recount activities are spent in connection with the election the recount seeks to resolve. Treating them as though they are not in connection with that election would create an entirely artificial distinction that undermines the purposes of BCRA and FECA. We urge the Commission to reject the requesters' assertions and treat these amounts as in connection with an election.

Questions Presented In AOR

With these principles in mind, we offer the following comments on the specific questions raised in the AOR.

1. Party committee use of recount funds after November 5, 2002

The request seeks confirmation that party committees may use recount funds raised before November 6, 2002 after that date for recount expenses related to elections held before that date. Section 402(b)(2)(B)(i)(II) specifically allows national party committees to use nonfederal funds raised before November 6 for recounts arising out of an election held before that date.

However, BCRA does not allow national party committees to raise nonfederal funds of any kind after November 5, 2002. 2 U.S.C. § 441i(a). Furthermore, national party committees may only use nonfederal funds for recount activity up until December 31, 2002. After that, any remaining nonfederal funds, including recount funds, must be returned to the donor or disgorged to the U.S. Treasury. 11 CFR 300.12(c).

2. State and local party fundraising for recounts after November 5, 2002

BCRA does not prohibit state and local party committees from raising funds for recount activities after November 5, 2002. However, state and local party committee disbursements for recounts are subject to the allocation rules. In those instances where a party committee expense can be attributed entirely to a particular federal candidate, the allocation rules require the party committee to pay for that expense entirely with funds from a federal account. 11 CFR 106.5(a)(2)(i) and 106.7(c)(2).

3. Federal candidate fundraising for recount funds after November 5, 2002

BCRA broadly limits fundraising by federal candidates and officeholders. It prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring or spending soft money in connection with an election for federal office. 2 U.S.C. § 441i(e)(1)(A). It also prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring or spending soft money in connection with any other election unless those funds comply with both the prohibitions and limitations in the FECA. 2 U.S.C. § 441i(e)(1)(B). Section 441i(e)(1) applies to federal candidates, officeholders and to any entity directly or indirectly established, financed, maintained, or controlled by a federal candidate or officeholder. *Id. See* 11 CFR 300.2(c).

Section 441i(e)(1) has the effect of partially overruling the recount exemptions in sections 100.91 and 100.151 of the regulations. The exemptions allow candidates to raise recount funds from individuals in excess of the contribution limits in section 441a. *See* Advisory Opinions 1978-92 and 1998-26. After November 6, 2002, recount funds raised by a candidate, either directly or through an affiliated entity, must comply with the contribution limitations in the Act, because these funds are in connection with a federal election.

BCRA allows federal candidates and officeholders to solicit donations for section 501(c) tax-exempt organizations, so long as certain conditions are met. In soliciting funds for an organization engaged in voter registration, voter identification, get-out-the-vote or generic campaign activity, federal candidates may only seek donations from individuals and in amounts not exceeding $20,000 in a calendar year. 2 U.S.C. § 441i(e)(4)(B). For other section 501(c) organizations, a federal candidate may solicit unlimited amounts so long as the solicitations do not specify how the funds will be used, and so long as the organization's principal purpose is not voter registration, voter identification, get-out-the-vote or generic campaign activity. 2 U.S.C. § 441i(e)(4)(A).

Under the regulations implementing these provisions, a candidate can only raise funds for a tax-exempt organization engaging in recount activity if (1) the organization's principle purpose is not to conduct election activities or voter registration, voter identification, get-out-the-vote and generic campaign activity; and (2) the candidate's solicitation is not to obtain funds for activities in connection with an election. 11 CFR 300.52(a) and 300.65(a). Thus, BCRA prohibits federal candidates from specifically soliciting funds for recount activities to be conducted by a tax-exempt organization.

4. Candidate control of recount entities after November 5, 2002

BCRA specifically states that funds raised by an entity directly or indirectly established, financed, maintained or controlled by a federal candidate must comply with the prohibitions and limitations of the FECA. If the candidate exercises direction

or control of such an entity, any recount funds raised by the entity must satisfy this requirement.

5. Effect of contribution limits

See above.

Conclusion

CRP and FEC Watch urges the Commission to treat recount funds as funds raised and spent in connection with a federal election, and to apply the prohibitions and limitations in BCRA and the FECA to those funds in responding the AOR 2002-13.

Respectfully submitted,

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